Supreme Court, U.S.
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Docket No. _____

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 2000

UNITED STATES OF AMERICA,
Respondent - Appellee,

v.

JAMES P. WHITE,
Petitioner - Appellant

On Petitioner for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether waiver of a defendant's rights in a plea agreement is automatically enforceable if, on appeal, the defendant calls into question the validity of the waiver. A waiver is enforceable only "if knowingly and voluntarily made." Petitioner did not understand that he was being charged with fraudulent, unlawful, and wilful taking of food stamps belonging to the United States. The factual basis read into the record by the prosecutor did not use the word "stole" but used the word "converted," the definition of which appellant did not comprehend and does such lack of understanding constitute a fair and just reason to allow petitioner to withdraw his plea.

B. Whether it was abuse of discretion for the District Court to deny petitioner's motion to withdraw his plea of guilty pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure where all that is required to withdraw the plea is a fair and just reason and was such a fair and just reason provided by the defense in that there was no intent on the part of defendant to commit the act and where petitioner felt managerially responsible which is substantially different from legal culpability.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

PARTIES 1

PROCEEDINGS BELOW 2

OPINIONS BELOW 3

JURISDICTION 4

STATEMENT OF THE CASE 4

ARGUMENT FOR GRANTING PETITION 6

I. WHETHER PETITIONER'S WAIVER OF HIS RIGHT TO APPEAL EXPRESSED IN THE PLEA AGREEMENT IS VALID AND ENFORCEABLE WHERE PETITIONER MOTIONS TO WITHDRAW THE GUILTY PLEA PRIOR TO SENTENCING FOR JUST AND FAIR REASON? 6

A. Standard of Review 6

B. Argument 7

II. WHETHER IT WAS ABUSE OF DISCRETION FOR THE COURT TO DENY PETITIONER'S REQUEST TO WITHDRAW HIS PLEA OF GUILTY FOR FAIR AND JUST REASONS? 8

A. Standard of Review 8

B. Argument 8

1. Petitioner Was Not Properly Advised That He Was Being Prosecuted For The Theft Of Government Monies: 10

CONCLUSION 13

APPENDIX A ..... App. A 1

APPENDIX B ..... App. B 1

TABLE OF AUTHORITIES

CASES PAGE

Fellouris v. United States,
860 F.Supp. 97(1993) 9

United States v. Navarro-Flores,
628 F.2d 1178 (9th Cir. 1980) 7

Chavez v. United States,
656 F.2d 512 (9th Cir. 1981) 6

Gearhart v. United States,
272 F.2d 499 (D.C. Cir. 1959) 13

Hill v. Lockhard,
474 U.S. 52, (1985) 10

Kercheval v. United States,
274 U.S. 220 (1927) 7, 13

McMann v. Richardson,
397 U.S. 759 (1970) 10

Nix v. Shiteside,
475 U.S. 157 (1986) 10

Strickland v. Washington,
466 U.S. 668 (1984) 10

Taylor v. United States,
320 F.2d 843 (9th Cir. 1953) 11

United States v. Buchanan,
59 F.3d 914 (9th Cir. 1995) 6

United States v. Carr,
80 F.3d 413 (10th Cir. 1996) 8

United States v. Del Rosario,
284 U.S. App. D.C. 90, 902 F.2d 55, (D.C. Cir.),
cert. denied, 498 U.S. 942 (1990) 10

United States v. Gordon,
4 F.3d 1567, 1572 (10th Cir. 1993) 9

United States v. Read,
778 F.2d 1437 (9th Cir. 1985) 7

United States v. Rubalcaba,
811 F.2d 491 (9th Cir. 1987) 8

United States v. Webster,
468 F.2d 769 (9th Cir. 1972) 8

United States v. Youpee,
419 F.2d 1340 (9th Cir. 1969) 7

STATUTES AND REGULATIONS

18 U.S.C. § 641 . . . . . 2, 4, 6, 11

18 U.S.C. § 3231 4

28 U.S.C. § 1254(1) 4

Federal Rules of Criminal Procedure, Rule 32(e) 3, 8

OTHER AUTHORITIES

9th Circuit Model Jury Instruction 8.10a 11

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UNITED STATES OF AMERICA,
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JAMES P. WHITE,
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On Petitioner for Writ of Certiorari
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for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, James P. White, hereby petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit Court which affirmed the District Court's Order denying petitioner's motion to withdraw plea of guilty.

PARTIES

Petitioner, James P. White, is the defendant - appellant in the action appealed to the United States Court of Appeals,

Ninth Circuit, Case No. 99-10013, from the United States District Court Eastern District of California, the Honorable Judge Robert E. Coyle, Case No. CR-F-97-5259-REC.

PROCEEDINGS BELOW

An information was filed on October 28, 1997 charging petitioner with conversion of public funds in violation of 18 U.S.C. section 641. Petitioner waived prosecution by indictment and consented that the proceeding may be by information instead of indictment.

On November 3, 1997, petitioner, represented by Attorney Rene Graham Pugh, entered a guilty plea to unlawfully converting public funds. Pursuant to the plea agreement filed on October 28, 1997, the government agreed to recommend a two-level reduction for acceptance of responsibility. The government also stipulated that the adjusted offense level is 9 based on the loss to the government in the amount of $54,590.45. The government agreed to recommend that petitioner receive a sentence of probation that includes a condition of home detention in lieu of imprisonment, a sentence at the low end of the applicable guideline range, and restitution in the amount of $19,472.88 for acts committed after the Mandatory Victims Restitution Act (enacted April 24, 1996). Finally, the government agreed to defer to the U.S. Probation Office to determine the amount of restitution for the loss suffered by the government prior to the Mandatory Victims Restitution Act. The matter was referred to the probation office for sentencing.

On November 11, 1997, petitioner retained the services of attorney Roger Litman to assist him in preparing a motion to withdraw the guilty plea. On December 31, 1997, the motion to withdraw guilty plea was filed and petitioner moved to withdraw

his plea of guilty on the basis that his plea was not knowingly and intelligently made for the reasons set forth in a declaration signed under penalty of perjury by petitioner. The declaration was attached to the Reply To Government's Opposition To Defendant James P. White's Motion To Withdraw Guilty Plea.

On December 31, 1997, petitioner filed a Notice of Motion to Withdraw Guilty Plea Pursuant to Federal Rules of Criminal Procedure, Rule 32(e). On January 22, 1998, the government filed an Opposition To Defendant James P. White's Motion To Withdraw Guilty Plea. On February 24, 1998 the Honorable Robert E. Coyle, Judge of the Eastern district of California (Fresno), denied petition's Motion to Withdraw Plea of Guilty. Sentencing was continued several times until August 8, 1998 when attorney John R. Joyce substituted in for attorney Roger Litman.

On November 13, 1998, a Second Notice of Motion and Motion to Withdraw Plea of Guilty was filed by attorney John Joyce. Appellant's second motion to withdraw plea was denied on December 14, 1998 at the hearing on the motion.

And, on December 14, 1998, petitioner was sentenced to 4 months in custody; 36 months supervised release; $100.00 penalty assessment; fine waived; 120 days home detention.

Petitioner filed a timely notice of appeal on December 23, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals, Ninth Circuit, Case Number 99-10013, is unreported and is reprinted at Appendix A. It affirmed the decision of the United States District Court, Eastern District of California, No. CR-F-97-3259-REC

reprinted at Appendix B. There was no action for reconsideration.

JURISDICTION

The Court of Appeals entered judgment on December 17, 1999. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction in the District Court was asserted under 18 U.S.C. § 3231. The instant Petition for Writ of Certiorari is filed within 90 days of that order.

STATEMENT OF THE CASE

Petitioner is accused of converting to his own use property of the United States Department of Agriculture (USDA), namely, food stamp coupons having a value of $54,590.45. These food stamp coupons were issued pursuant to the USDA's food stamp program, and were accepted for non-food items at the petitioner's business in Fresno, California. The food stamp coupons were then redeemed through the petitioner's business bank account. On November 3, 1997, petitioner entered a guilty plea to unlawfully converting public funds pursuant to the plea agreement.

Petitioner, a seventy-one year old, African-American man, retired Fresno Firefighter, understood that he was being investigated for discrepancies in the acceptance of food stamps at his place of business and at no time did he understand that he was being accused of "stealing" or "committing fraud" against the United States.

Rene Pugh, trial-counsel for petitioner did not explain that conversion of public funds, in violation of 18 U.S.C. § 641, meant that he had stolen public funds or committed fraud to

obtain funds of the United States. Petitioner believed this action against him was civil in nature and that he was pleading guilty to a crime involving inconsistencies found during a government audit.

Attorney Rene Pugh declared that she did not explain to appellant his statutory right to appeal. Ms. Pugh did not explain that the standard on appeal would be abuse of discretion and that there is a very low rate of success in challenging a district court's exercise of discretion in sentencing.

Attorney Pugh stated that she had explained the "elements of the offense" portion of the memorandum of plea agreement, and petitioner understood the offense to consist of having accepted more than $100.00 of food stamps in error and having deposited the food stamps in the bank. Petitioner did not understand that the word "converted" meant that he had, by means of fraud or theft, "stolen" from the United States or that he had intentionally accepted food stamps knowing that he was violating the law.

Petitioner does not recall that the factual basis for the plea was the acceptance of food stamps for non-food items. Petitioner believes that food stamps were not accepted at his liquor and deli business for non-food items. The essence of petitioner's motion to withdraw his plea of guilty was that he did not understand that he was being charged with a theft of government monies. He believed he was accepting responsibility for inconsistencies found during a government audit.

Petitioner suffers from a hearing impairment due to being exposed to artillery fire while serving in the military and constantly being around loud diesel engines while employed by the Fresno Fire Department. Petitioner also suffers from

memory problems and is often unable to recall details or information obtained from other persons.

Petitioner presented evidence that his attorney did not explain to him the essence of conversion of public funds, in violation of 18 U.S.C. § 641, that he had stolen funds or committed fraud to obtain funds of the United States. Petitioner declared that at no time did his trial-attorney, Ms. Pugh, explain he would be giving up his right to appeal except if the sentence was illegal or an abuse of discretion.

ARGUMENT FOR GRANTING PETITION

I. WHETHER PETITIONER'S WAIVER OF HIS RIGHT TO APPEAL EXPRESSED IN THE PLEA AGREEMENT IS VALID AND ENFORCEABLE WHERE PETITIONER MOTIONS TO WITHDRAW THE GUILTY PLEA PRIOR TO SENTENCING FOR JUST AND FAIR REASON?

A. <u>Standard of Review</u>:

"A guilty plea involves the waiver of several constitutional rights, including the privilege against self-incrimination, the right to a jury trial, and the right to confront ones accusers. Therefore, competence to plead guilty is measured by the "reasoned choice"[1] standard." (*Chavez v. United States*, 656 F.2d 512, 519 (9th Cir. 1981) This court reviews *de novo* the question of whether defendant validly waived his right to appeal under a plea agreement. *United States v. Buchanan*, 59 F.3d 914, 916 (9th Cir. 1995).

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[1] See 18 U.S.C. § 4244.

B. Argument:

A defendant may waive the statutory right to appeal a sentence. *United States v. Buchanan, supra,* at 917. A waiver of appellate rights in a plea agreement is not automatically enforceable if, on appeal, the defendant calls into question the validity of the waiver. A waiver is enforceable only "if knowingly and voluntarily made."

At the time petitioner entered his guilty plea he was under the impression that he was accepting responsibility for inconsistencies found during a government investigation. Petitioner did not understand he was being charged with a crime the gravaman of which is theft of government monies. Petitioner owned a mom and pop store. He did not run the cash registers. His two sons did, and prior to that he had two other employees who did. All petitioner did was cut the meat and run the deli in the back of the business. He did not work in the store on a daily basis. No investigator ever went into petitioner's business and observed what was happening. The discrepancies were done solely on looking through petitioner's receipts.

A district court's refusal to grant a motion for withdrawal of a guilty plea is reviewed under the abuse of discretion standard. *United States v. Read*, 778 F.2d 1437, 1440 (9th Cir. 1985) Federal Rules of Criminal Procedure Rule 32(d) states that "[i]f a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.' The defendant has no "right" to withdraw his plea. *Castello*, 724 F.2d at 814 (citing *United States v. Youpee*, 419 F.2d 1340, 1343 (9th Cir. 1969)). Most courts have relied on dictum in *Kercheval v. United States*, 274 U.S. 220, 224 (1927), to define the fair and just standard. Fed.R.Crim.P. 32 advisory committee note; see, e.g., *United*

States v. Navarro-Flores, 628 F.2d 1178, 1183 (9th Cir. 1980); *United States v. Webster* 468 F.2d 769, 771 (9th Cir. 1972), *cert. denied*, 410 U.S. 934 (1973). In *Kercheval* the Supreme Court stated that a court shall `vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence.' *Kercheval v. United States*, 274 U.S. at 224, 47 S.Ct. at 583." *United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987)

II. WHETHER IT WAS ABUSE OF DISCRETION FOR THE COURT TO DENY PETITIONER'S REQUEST TO WITHDRAW HIS PLEA OF GUILTY FOR FAIR AND JUST REASONS?

A. Standard of Review:

Withdrawal of pleas is governed by Federal Rules of Criminal Procedure, Rule 32(e), which states that if a motion is made before sentencing, "the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." (*United States v. Carr*, 80 F.3d 413, 419 (10th Cir. 1996)) In addition, the court opined that a motion to withdraw a plea before sentencing should be freely allowed and viewed with favor. (*Id.)*

B. Argument:

Seven factors are to be considered when a defendant motions to withdraw a guilty plea: (1) whether the defendant has asserted his innocence; (2) whether withdrawal of the guilty plea would prejudice the government; (3) the delay, if any, in filing the motion to withdraw and reasons therefor; (4) whether withdrawing the plea would substantially inconvenience the court; (5) the assistance of counsel; (6) whether the plea was

knowing and voluntary; and (7) whether the withdrawal would waste judicial resources. (*United States v. Gordon*, 4 F.3d 1567, 1572 (10th Cir. 1993))

In the instant matter, petitioner felt managerially responsible which is substantially different from legal culpability. There was no intent on the part of petitioner to commit the act alleged.

There would be no prejudice to the government in permitting withdrawal of petitioner's plea, other than the minimal amount inherent in the nature of such things, because the trial would require only a few witnesses, mostly USDA employees. For the same reasons, there would be little inconvenience to the court or waste of judicial resources.

Petitioner pled guilty on November 3, 1997. Ten days later, on November 14, 1997, petitioner contacted the office of attorney Roger K. Litman concerning his desire to withdraw his plea of guilty. Petitioner met with Mr. Litman on November 19, 1997 and retained his services to determine if petitioner "had a legal basis for withdrawing his plea and to assist with a motion to withdraw said plea." In a declaration attached to petitioner's Reply To Government's Opposition to Defendant's Motion To Withdraw Plea Of Guilty and signed under penalty of perjury, Mr. Litman explained to the court the reasons for delay in filing the motion to withdraw the guilty plea and the motion was filed on December 31, 1997.

An objective standard of reasonableness and prevailing professional norms requires that one's attorney fully inform his/her client of all possible defenses available to him before suggesting that the defendant plead guilty. (See, *Fellouris v. United States* 860 F.Supp. 97, 99 (1993) [ineffective assistance because of failure to present existing defense].) As to the

assistance by petitioner's previous counsel, petitioner was misinformed when his counsel told him that his case was indefensible, thus leaving petitioner substantially uninformed regarding his plea of guilty. Petitioner had no cause to complain about his first attorney's performance before he realized that her representation had been inadequate.

A claim of ineffective assistance of counsel requires the Court to apply a two-part test set forth in *Strickland v. Washington* 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Under *Strickland*, a defendant must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness and prevailing professional norms. *Id.* at 687-688; see *Nix v. Shiteside*, 475 U.S. 157, 165, 89 L.Ed.2d 123, 106 S.Ct. 988 (1986); and (2) counsel's inadequate representation prejudiced the outcome against the defendant. *(Id* at 687.)

1. <u>Petitioner Was Not Properly Advised That He Was Being Prosecuted For The Theft Of Government Monies:</u>

The Supreme Court established the applicability of the *Strickland* test in the context of a guilty plea in *Hill v. Lockhard*, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985); see *United States v. Del Rosario* 284, 284 U.S. App. D.C. 90, 902 F.2d 55, 57 (D.C. Cir.), cert. denied, 498 U.S. 942 (1990). To establish the first prong, a defendant who claims that his plea was involuntary as a result of ineffective assistance of counsel must show that counsel's advice during the plea process was not "within the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56 (quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771, 25 L.Ed.2d 763, 90 S.Ct. 1441) the second, or "prejudice", prong requires the defendant to show "that there is a reasonable probability that but

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Id.* at 59; *Del Rosario*, 902 F.2d at p. 57.)

The essence of petitioner's motion to withdraw his plea of guilty was that he did not understand that he was being charged with theft of government monies. He believed he was accepting responsibility for inconsistencies found during a government audit. The uncontradicted evidence before the court was that petitioner believed he was being investigated for discrepancies in the acceptance of food stamps. He did not understand that he was being accused of stealing or committing fraud. Subject to the penalty of perjury, petitioner presented evidence that his attorney did not explain to him the essence of conversion of public funds, in violation of 18 U.S.C. § 641, that he had stolen funds or committed fraud to obtain funds of the United States. If deemed credible by the court, petitioner's declaration proves that he did not understand the meaning of the word "converted" as the term was used in the plea memorandum and at the time his plea was entered. Should the Court therefore determine that, in fact, petitioner did not understand that he was being charged with the fraudulent, unlawful, and wilful taking of food stamps belonging to the United States, such understanding would constitute a fair and just reason to allow petitioner to withdraw his plea. (*Taylor v. United States* 320 F.2d 843, 851 (9th Cir. 1953).

Certainly, if this case had proceeded to trial the court would have instructed the jury with 9th Circuit Model Jury Instruction 8.10a. The court would have advised the jurors of the first element of the offense: that the defendant stole property of value with the intention of depriving the owner of the use or benefit of the property. This first element, which is the very essence of the offense of conversion, was not explained in such terms in the memorandum of plea agreement or at the time the

plea was taken. The factual basis read into the record by the prosecutor did not use the word "stole" but used the word "converted," the definition of which petitioner did not comprehend. Accordingly, petitioner demonstrated a just and fair reason for the court to permit him to withdraw his guilty plea.

Petitioner's plea of guilty was motivated by two factors: (1) he was the owner of the business, and (2) he naturally felt responsible for whatever actions were done during the course of business that were allegedly illegal despite the fact he had no knowledge of the acts. This sense of responsibility is without regard to any others who may have been responsible for such acts which have been alleged as illegal. Petitioner has been prejudiced because had he fully understood the charges and understood he had a defense to the charges he would not have pled guilty.

At the sentencing hearing held on December 7, 1998, counsel argued to the court that he had a conversation with Ms. Marootian, from the probation office. Counsel informed the court of a conversation he had had with Ms. Marootian, who was at the time in the court room.

> "And Ms. Marootian shared with me that approximately a year ago, around the time of the plea, that the plea was entered, she – had been called by Ms. Pugh, the attorney for the defendant, and that Ms. Pugh apparently didn't hear Ms. Marootian answer the phone call and was screaming and yelling at members of the office. And Ms. Marootian asked her why she was so upset. And she said that this case is just wearing me out, I'm stressed out about this case of Mr. White. He keeps saying he's not guilty.

. . ."

When discussing this with Ms. Marootian, "she indicated, well, I don't think he did it. Frankly, I think it was one of his two sons, one of them was on felony probation, felony parole at the time."

The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just. (*Gearhart v. United States*, 272 F.2d 499, 502 (D.C. Cir. 1959) (quoting *Kercheval v. United States*, 274 U.S. 220, 224 (1927)). In *Gearhart*, the court went further in holding that where the accused who seeks to withdraw his plea has a defense to the charge, the "District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant. (*Id.* at 502.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that petitioner has demonstrated fair and just reasons to permit him to withdraw his plea of guilty. This case should be reversed and remanded to allow petitioner to withdraw his plea of guilty and enter a plea of not guilty.

Dated: March 15, 2000.

Respectfully submitted,

_____

JOHN R. JOYCE
Attorney for Appellant,
James P. White

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	No. CR-F-97-5259 REC
Plaintiffs,	)	ORDER DENYING
v.	)	DEFENDANT'S MOTION
	)	TO WITHDRAW PLEA
JAMES P. WHITE,	)	OF GUILTY
Defendant.		

On February 9, 1998, the court heard defendant's Motion to Withdraw Plea of Guilty. Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies this motion for the reasons set forth herein.[2]

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[2] As will be noted in this order, defendant has been represented by Rene Pugh in proceedings before the court in connection with this criminal action. However, the Motion to Withdraw Plea of Guilty was filed on defendant's behalf by Roger Litman. At oral argument on February 9, the court noted that Ms. Pugh was still shown as counsel of record for defendant and that no substitution of counsel substitution Mr. Litman as counsel in place of Ms. Pugh had been filed with the court. Mr. Litman explained that Ms. Pugh will remain as counsel of record for defendant if the court denies the Motion to Withdraw Plea of Guilty. However, if the court grants the Motion to Withdraw Plea of Guilty, Ms. Pugh will no longer be counsel for defendant. On February 10, 1998, Mr. Litman filed an Appearance in which it is indicated that he is retained for a special appearance in connection with the Motion to Withdraw Plea of Guilty.

On October 24, 1997, defendant James P. White was charged by information with one count of conversion of public monies in violation of 18 U.S.C. § 641, the information alleging that defendant converted to his own use food stamp coupons accepted at defendant's business, White's Liquor and Deli, between January 1, 1993 and February 10, 1997.

On October 28, 1997, a Memorandum of Plea Agreement was filed with the court, signed by the Government, defendant, and defendant's counsel, Rene Pugh. The Memorandum of Plea Agreement states in pertinent part:

> The defendant has read the charge against him contained in the Information, and the charge has been fully explained to him by his attorney. Further, the defendant fully understands the nature and elements of the crime with which he has been charged, together with the possible defenses thereto, and has discussed them with his attorney.

The written plea agreement provides that "defendant waives his right to appeal or collaterally attack his plea. this agreement does not, however, prevent the defendant from appealing his sentence based on a claim of illegality." The plea agreement sets forth the elements of the offense as follows:

> The defendant is advised that the elements of the offense of conversion of public monies, in violation of 18 U.S.C. § 641, are as follows:
>
> i. The defendant knowingly converted to his use property.
> ii. The property belonged to the United States.
> iii. The property's value exceeded $100.

The plea agreement set forth the following factual basis:

> Between on or bout January 1, 1993, an don or about February 10, 1997, within Fresno County, State and Eastern District of California, the defendant willfully and knowingly converted to his won use property of the United States Department of Agriculture, namely, food stamp coupons having a value of $54,590.45 which issued pursuant to tl.e United States Department of Agriculture's food stamp program and which were accepted for non-food items at the defendant's business, White's Liquor and Deli, located at 2593 South Elm Avenue, Fresno, California, and redeamed [sic] through the defendant's business bank account.

On November 3, 1997, defendant entered a plea of guilty pursuant to the written plea agreement. At the hearing on the change of plea, the court, after placing defendant under oath, asked defendant if he had carefully read the plea agreement and whether he understood the plea agreement. Defendant answered affirmatively. The court then asked defendant whether everything in the plea agreement was true and whether defendant was pleading guilty because he was in fact guilty. Again, defendant answered affirmatively. The court asked defendant his age (69) and how far he had gone in school (two years at City College). The court asked defendant whether he understood that the purpose of the proceeding was t let defendant enter a plea of guilty to conversion of public funds as set forth in the information, to which question defendant answered yes. Defendant responded affirmatively to the court's question whether he had discussed this matter with his attorney, whether, after discussing the matter with his attorney, he still wished to plead guilty, and whether he was satisfied with his

attorney. The court then asked defendant whether he had had any drugs, alcoholic beverages, or medication in the past 24 hours, to which question defendant answered "no". Ms. Pugh advised the court that she was satisfied that defendant was competent to plead guilty and guilty of the charge to which he was pleading. The court then found defendant competent. The court then questioned defendant whether he understood the various constitutional rights he was giving up by pleading guilty, all of which defendant stated he understood and that he wished to waive and plead guilty. Defendant responded negatively to the court's questions whether any threats or promises, other than thos in the plea agreement, had been made to get defendant to plead guilty. The court then asked defendant whether he understood that the Court is not bound by the plea agreement, to which the defendant answered "yes". The court asked defendant if he understood that defendant would not be allowed to withdraw his plea if the Probation Office made a recommendation different from that set forth in the plea agreement or if the court sentenced defendant differently from that set forth in the plea agreement, to which questions the defendant answered "yes" and advised the court that he still wished to plead guilty. the court then set forth the potential sentence that could be imposed and asked defendant if he still wished to plead guilty, to which question defendant answered "yes". The Government then set forth the factual basis of the plea and the court, after reminding defendant that he was under oath, asked defendant whether defendant converted the public funds by use of appropriating the foods stamps as set forth by the government and the defendant answered "yes". Defendant then entered a plea of guilty.

On December 31, 1997, defendant, represented as noted by Mr. Litman, filed a Motion to Withdraw Guilty Plea. In so moving, defendant contends that his plea was not knowingly and intelligently made, relying on defendant's declaration filed in

support of the motion. Defendant avers in pertinent part:

> 2. I retained attorney Rene Graham Pugh to represent me and my wife in July of 1997. Between that month and the date I entered my plea of guilty, November 3, 1997, I met with Ms. Pugh on approximately three to five occasions.
>
> 3. During the conferences that I had with Ms. Pugh it was my understanding that I was being investigated for discrepancies in the acceptance of Food Stamps at White's Liquor and Deli. At no time did I understand that I was being accused for stealing or committing fraud. At no time was it explained to me that conversion of public funds, in violation of 18 U.S.C. § 641, meant that I had stolen public funds or committed fraud to obtain funds of the United States. I believed that this action was civil in nature. I did not understand that I was pleading guilty to a crime. Attached hereto as Exhibit A ... is a handwritten statement which accurately sets forth the surrounding circumstances at and near the time when I entered my plea of guilty....
>
> 4. When Ms. Pugh explained to me the 'elements of the offense' potion of the memorandum of plea agreement, I understood the offense to consist of having accepted more than $100.00 of food stamps in error and having deposited the food stamps in the bank. I did not understand that the word 'converted' meant that I had, by means of fraud or theft, stolen from the United States or that I had intentionally accepted

food stamps knowing that I was violating the law. I do not recall my attorney reading to me the specific language, on page four, lines 5-10, which made up the factual basis portion of the plea memorandum. Although I am sure that Ms. Pugh reviewed this paragraph with me generally, I do not believe that she specified to me that the essence of the charge against me was that food stamps were accepted for non-food items. When I read through the plea agreement I did not notice that the factual basis for my plea was acceptance of food stamps for non-food items. To my knowledge all food stamp data submitted to the government have been true and correct.

5. I do not believe that I am guilty of stealing from the government. It has never been my intent to do so. To my knowledge, food stamps have not been accepted at White's Liquor and Deli for non-food items.

6. Since November of 1997 I have been under the care and treatment of Sam Castro, M.D., a Fresno psychiatrist. I am informed and believe, and on the basis of such information and belief allege that Dr. Castro has diagnosed me as suffering from a general anxiety disorder consisting of anxiety and depression. Dr. Castro prescribed a medication, Adivan, which I am taking on a daily basis.

7. Since 1993 I have been a patient of George E. Booker, M.D., a Fresno physician who practices internal medicine. Dr. Booker has prescribed two medications Vasotec 10 mg. and Triamterene/HCTZ for me.

8. For the last 20 years I have suffered from a hearing impairment. I am informed and believe, and on the basis of such of [sic] information and belief allege that my hearing problems stem from my exposure to artillery fire while serving in the military and to constantly being around loud diesel engines while I was employed at the Fresno Fire Department. My hearing had gotten worse since I have retired. My family has advised me on numerous occasions that I should obtain a hearing aid, however I have not done so.

9. For the last three years, I have been experiencing problems with my memory. At first I began forgetting where I had placed items. More recently, my problem has gotten worse. I am often unable to recall details or information obtained from another person.

10. At no time did my attorney explaine to me my right to appeal. She did not advise me that, if not waived, I would have had the right to appeal the sentence imposed by the judge. She did not advise me that, if not waived, I would have had the right to appeal the sentence imposed by the judge. I did not understand that under the condition of the plea memorandum agreed to that I gave up my right to challenge the sentence imposed if I believed the sentence was illegal or an abuse of discretion.

Exhibit A attached to defendant's declaration is a handwritten statement addressed to you:

> I James P. White wish to change my plea of guilty, to not guilty, Your Honor, Sir. I have been suffering from a chronic medical Problem for quit [sic] a few years now and it is so clear to me now that it sometimes affects me mentally in the way of making informed decisions [sic]. Your Honor, my Plea of Guilty at the time I made such Plea I did not intend for that Plea to indicate that I had committed a crime. I only intended that Plea to except [sic] responsibility for any discrepancies that I could not explain at the time, involving my business. After talking to one of my sons late last week I discovered that there is an explanation for the discrepancies involving Food Stamps and my business. Your Honor Sir, at the time of the Pla [sic] of Guilty I was not mentally coherent to the fact that I was excepting [sic] responsibility for a crime. I have not committed a crime, and to also add, I felt intimidated by the idea that my lovely wife was being disturbed by this whole matter; which, consequentially [sic] lead me to make my totally misunderstood Plea of Guilt. I was not feeling well when I acted Hastly [sic] to bring this whole matter to closure by pleading guilty. I am taking medications which does induce certain side effects; namely, Dizziness, Headaches, and Mental Confusion.

Rule 32(e), Federal Rules of Criminal Procedure, allows the withdrawal of a guilty plea before sentence is imposed "if the defendant shows any fair and just reasons." The defendant bears the burden of persuasion. United States v. Turner, 898 F.2d 705, 713 (9th Cir. 1990). The defendant has no right to withdraw his plea. United States v. Rubalcaba, 811 F.2d 491,

493 (9th Cir. 1987). The "fair and just reason" standard has been defined as a showing that the guilty plea was "unfairly obtained or given through ignorance, fear or inadvertence." Id. Courts have denied a motion to withdraw a guilty plea absent something more than the defendant's change of mind. United States v. Rios-Ortiz, 830 F.2d 1067, 1070 (9th Cir. 1987).

As grounds for withdrawal of his guilty plea, defendant now asserts that he suffers from chronic medical problems and is taking medication. As noted above, the record during the taking of the plea belies any inference that these medical problems and medication precluded defendant from knowingly, intelligently and voluntarily entering a guilty plea despite his subsequent assertions to the contrary. Defendant denied under oath that he had taken any medication within the past 24 hours. The court asked the defendant five times whether he wanted to plead guilty and each time defendant responded affirmatively. At no time during the taking of the plea was any indication given to the court that defendant did not understand the proceedings, the questions being asked of him, or the consequences of the guilty plea. His counsel responded that she believed defendant to be competent. There is no indication in the record of the entry of the plea that defendant had any trouble hearing the court. In addition, the United States submits the declaration of Ralph R. Thompson, senior special agent for the USDA who conducted the investigation of defendant. Thompson avers that defendant never displayed any signs of a hearing problem, never stated that he had any physical or mental infirmities, never stated that he was under a doctor's care or taking medication, and never claimed that he could remember anything.

The United States further asserts that, even if defendant had admitted to taking medication at the time the plea was entered, one of those medications does not affect clarity of thought. The United States is referring to the Ativan prescribed

by Dr. Castro. Assistant United States Attorney Kalminir avers that she spoke with Dr. Castro on January 12, 1998, that Dr. Castro indicated he was treating the defendant for anxiety and that defendant was not suffering from depression. Ms. Kalminir avers that Dr. Castro indicated that Ativan in large does [sic] could impair mental function but that defendant is not taking significant enough doses to cause any mental impairment. The court also notes that defendant's declaration does not aver when be became Dr. Castro's patient and does not specifically aver that he was Dr. Castro's patient at the time the plea was entered. He merely avers that he has been his patient since November of 1997. Here, the written plea agreement was filed with the court on October 28 and the guilty plea entered on November 3. Furthermore, from the court's research, Vasotec is prescribed for the treatment of hypertension, see Physicians Desk Reference, pp. 1816-1817 (1997 Ed.), and triamterene is a diuretic. See Attorneys Dictionary of Medicine; The Merck Manual, pp. 2525-2526. Neither of these medications would appear to cause an inability to act knowingly and voluntarily, especially in the absence of any contemporaneous indication or medical opinion to that effect. Moreover, a plea is not involuntary merely because stress, mental anguish, depression or anxiety accompanies the decision to enter a plea or guilty. Miles v. Dorsey, 61 F.3d 1459, 1470-1471 (10th Cir. 1995).

Defendant also bases the motion to withdraw his guilty plea on his assertions that he did not understand the charges and that he was pleading guilty to a crime. Again, the record before the court belies these assertions. Both the written plea agreement, which defendant stated in writing and orally that he had read and that he understood, and the actual entry of the guilty plea make clear that defendant was pleading guilty to a crime for which he could be punished by a maximum term of imprisonment of ten years and a maximum fine of $250,000 or both. Defendant is a businessman who completed two years of

college. Therefore, his belated protestations that he did not understand the proceedings are simply not credible. Equally incredible is defendant's belated assertion that he did not understand the meaning of the term "convert" within the context of the charges against him. In the court's opinion, what defendant is really saying is that he now believes that he is innocent, i.e., that he has changed his mind.

Defendant also bases the motion to withdraw on his assertion that Ms. Pugh did not advise him that he was waiving certain of his appeal rights by pleading guilty. In support of this contention, defendant submits the declaration of Rene Pugh in which she avers in pertinent part:

> 21. While representing Mr. White, prior to his plea of guilty on November 3, 1997, we discussed appeal and his waiver of appeal by the guilty plea. I did not specifically define his statutory right to appeal. I did not explain to Mr. White that the standard on appeal would be abuse of discretion. I did not explain that standard to Mr. White. I did not advise Me. White that there is a very low rate of success in challenging a district court's exercise of discretion in sentencing.

Defendant contends that, without the explanation of his appeal rights by Ms. Pugh and other relevant considerations concerning appeal, he was not in a position to knowingly waive his right to appeal.

Again, this assertion is belied by the written and oral statements of defendant that he had read and understood the plea agreement. The waiver of appeal rights is clearly set forth in the plea agreement. In the Ninth Circuit, a Rule 11 colloquy

on the waiver of the right to appeal is not a prerequisite to finding the waiver to be valid. United States v. Desantiago-Martinez, 38 F.3d 394, 395 (9th Cir. 1992).

It also is noted that the motion to withdraw the guilty plea was made almost two months after the entry of the plea. Mr. Litman has filed a declaration in which he avers that defendant telephoned his office on November 14, 1997, requesting a consultation concerning his desire to withdraw his guilty plea, that Mr. Litman met with defendant on November 19 and was retained by defendant to determine if he had a legal basis for withdrawing the plea and to prepare a motion to do so, that Mr. Litman ordered a transcript of the change of plea proceedings on November 24 and was provided with the transcript on November 25, that Mr. Litman attempted to obtain additional information concerning the investigation and the basis for the entry of the guilty plea and obtained a copy of the PSR on December 30, Ms. Pugh's copy having been mailed to her previous business address and that the filing of the motion was delayed by the press of other business, a cold, a family vacation, and the refurbishing of his office. The court accepts as true Mr. Litman's averments. However, the court notes that defendant met with the Probation Office for his presentence interview before this motion was filed. The PSR prepared on December 1, 1997 specifically states:

> 22. During the probation interview, the concurred with the stipulated statement contained within the plea agreement, and verbally accepted responsibility for the offense. He made no further statements regarding his conduct pertaining to the offense.

Again, the court is persuaded that defendant is seeking to withdraw his guilty plea merely because he has changed his

mind.

ACCORDINGLY, IT IS ORDERED that defendant James White's Motion to Withdraw Plea of Guilty is denied.

Dated: February 24, 1998

/s/

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES P. WHITE,
MEMORANDUM[1]

Defendant-Appellant.

No. 99-10013

D.C. No. CR-97-05259-REC

Appeal from the United States District Court
for the Eastern California
Robert E. Coyle, District Judge, Presiding

Submitted December 13, 1999[2]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: LEAVY, TROTT, and SILVERMAN, Circuit Judges.

James P. White appeals from the district court's denial of his motion to withdraw a guilty plea pursuant to Fed. R. Crim. P. 32(e). We have jurisdiction pursuant to 28 U.S.C. § 1291, we review for abuse of discretion, *see United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th cir. 1980), and we affirm.

White contends that the district court erred by denying his motion to withdraw a guilty plea because his attorney did not adequately explain the charge against him. This contention lacks merit.

White testified under oath, at his change of plea hearing, that he was satisfied with the representation he received, that he had reviewed the plea agreement with his attorney, that the factual basis for his plea was accurate, and that he understood the charge to which he was pleading guilty, as well as the possible consequences of his plea. The district court was entitled to credit White's testimony at his rule 11 hearing over his subsequent declaration. *See United States v. Moore*, 559 F.2d 310, 313 (9th Cir. 1979) (holding that solemn declarations in open court carry a strong presumption of verity). Thus, the district court did not abuse its discretion by denying White's motion to withdraw his guilty plea. *see United States v. Alber*, 56 F.3d 1106, 1111 (9th cir. 1995) (holding that a defendant has no legal right to withdraw his guilty plea after it has been accepted by the district court and bears the burden of demonstrating a "fair and just reason" for doing so); *see also*

Fed. R. Crim. P. 32(e).[3]

AFFIRMED.

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[3] On appeal White argues for the first time that his counsel was ineffective for failing to adequately explain the nature of the charge against him. Because these contentions were not raised below, we do not address them here. *See Willard v. State of California*, 812 F.2d 461, 465 (9th Cir. 1987).